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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	CASE NO. V1300CR201080049 Hon. Warren Darrow DIVISION PTB **DEFENDANT JAMES ARTHUR RAY'S OBJECTION TO PROPOSED INSTRUCTIONS ON "KNOWING" AND "INTENTIONAL" MENTAL STATES**

Defendant James Arthur Ray, by and through undersigned counsel, hereby objects to the State's proposed jury instructions regarding the mental states of "knowing" and "intentional." This objection is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The State charged Mr. Ray with three counts of reckless manslaughter, and the parties tried the case with the understanding that recklessness was the mental state that the State must prove. For the first time during the negotiation of jury instructions, however, the State informed the Court and the Defense of its belief that it had introduced evidence to prove that Mr. Ray acted knowingly or intentionally. The State thus requested that the Court instruct the jury on the mental states of "knowing" and "intentional." These instructions would confuse the jury and would violate Mr. Ray's constitutional rights under the Sixth Amendment and the Due Process Clause.

II. ARGUMENT

A. Sixth Amendment Right to Notice of the Offense

The "notice" component of the Sixth Amendment "means that the indictment or information must describe the offense with sufficient specificity so as to enable the accused to prepare a defense . . . ." *State v. Sanders*, 205 Ariz. 208, 213 (App. 2003), *overruled on other grounds*, *State v. Freeney*, 223 Ariz. 110 (2009). As an outgrowth of this requirement, amendments at trial that change the nature of the offense charged or otherwise prejudice the defendant are not permitted. *Id.* at 214; *see also* Ariz. R. Crim. P. 13.5(b) ("The preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or grand jury indictment. The charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment."). An amendment changes the nature of the offense "either by proposing a change in factual allegations or a change in the legal description of the elements of the offense." *Sanders*, 205 Ariz. at 215.

Even where the State does not propose to amend the indictment, an instruction to the jury on an uncharged element is an impermissible constructive amendment of the indictment. "Constructive amendment of the indictment can occur 'when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the

grand jury.'" *United States v. Jones*, 418 F.3d 726, 729 (7th Cir. 2005) (quoting *United States v. Cusimano*, 148 F.3d 824, 829 (7th Cir. 1998)). *See also United States v. Apodaca*, 843 F.2d 421, 428 (10th Cir. 1988) ("the trial court constructively amends the indictment if it allows the Government to prove its case in a fashion that creates a 'substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.'").

Here, instructing the jury on "knowing" and 'intentional" offenses, despite the fact that the case has been charged and tried as a crime of recklessness, would change the nature of the offense and therefore violate the Sixth Amendment. The mental states of "knowing" and "intentional." differ in critical respects from the charged mental state of recklessness. They implicate distinct factual allegations, and, together with the element of causation, they constitute the distinct and *greater* crime of murder. The Sixth Amendment does not permit the State or the Court to alter the charged crime in these ways.

The State's argument that the instructions are harmless because the State has introduced evidence that supports them (or "overproven" its case) has been expressly rejected by federal and Arizona courts. The prohibition on substantive amendments to the charges applies irrespective of what evidence the State may have introduced at trial. *See Sheppard v. Rees*, 909 F.2d 1234, 1238 (9th Cir. 1989) ("The constitutional requirement of a fair trial is not satisfied merely by the existence in the record of sufficient evidence to establish guilt. To apply such a test as dispositive would be to ignore other mandatory components of a fair trial, and would defeat the purpose of the notice requirement."); *Sanders*, 205 Ariz. at 217 (rejecting the state's argument that admission of evidence of a greater offense justified amending charging document; this would exempt the State "from its obligation to adhere to the Sixth Amendment's notice requirement"). Permitting the State to instruct the jury on the mental states of "knowing" and "intentional" would "eviscerate the type of 'notice' contemplated by the Sixth Amendment." *Sanders*, 205 Ariz. at 217.

B. The Due Process Requirement of Notice

In addition to the specific Sixth Amendment restrictions on amendments, the State's proposed instructions violate the basic Due Process requirement of notice of the charges. Mr.

Ray was not apprised until *today*—four months into trial and *after* the close of evidence—that the State may seek conviction on a theory that he acted knowingly or intentionally. This absence of timely notice prevented Mr. Ray from defending himself against allegations that he acted knowingly or intentionally. As the Arizona Court of Appeals has recognized, when "a defendant's counsel is notified that his client faces a certain charge, he prepares for trial on that charge with the result that his opening statement, his cross-examination of the state's witnesses, his presentation of his client's case, and all other efforts are targeted at the elements contained in the charged offense. He justifiably neglects to pursue inquiry into matters that are irrelevant to those elements, even though evidence of such matters might arise during trial and even though the evidence might constitute another crime." *Sanders*, 205 Ariz. at 215. That is why "[n]otice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded." *In re Gault*, 387 U.S. 1, 33 (1967). The proposed instructions violate that notice requirement.

III. CONCLUSION

The State's proposed instructions on the knowing and intentional mental states would violate the Sixth Amendment and the Due Process Clause. They would also confuse the jury unfairly and unnecessarily. The instructions must not be given.

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